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No. 96-1587

In the Supreme Court of the United States

OCTOBER TERM, 1996

CITY OF ALBUQUERQUE, PETITIONER

v.

CAROL M. BROWNER, ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Environmental Protection Agency (EPA) has reasonably construed the Clean Water Act to permit Indian Tribes that are treated in the same manner as States under the Act to adopt water quality standards that are more stringent than federal water quality standards, without requiring a showing of the scientific basis supporting the more stringent tribal standards.

2. Whether EPA's approval of the Isleta Pueblo's water quality standards for ceremonial use violated the Establishment Clause of the First Amendment.

3. Whether EPA regulations providing that States and Tribes, but not holders of discharge permits, may seek EPA assistance in resolving disputes arising from their differing water quality requirements rest on a reasonable interpretation of the Clean Water Act.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-32) is reported at 97 F.3d 415. The opinion of the district court (Pet. App. 33-49) is reported at 865 F. Supp. 733.

JURISDICTION

The judgment of the court of appeals was entered on October 7, 1996. A petition for rehearing was denied on January 7, 1997. Pet. App. 50-51. The petition for a writ of certiorari was filed on April 7, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Clean Water Act (CWA or Act), 33 U.S.C. 1251 *et seq.*, is a comprehensive statute designed "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters" through the reduction and eventual elimination of the discharge of pollutants into those waters. 33 U.S.C. 1251(a). To achieve those goals, the CWA establishes a partnership between the federal government and the States, in which the States have the "primary responsibilities and rights" to abate water pollution. 33 U.S.C. 1251(b); see 33 U.S.C. 1370; *Arkansas* v. *Oklahoma*, 503 U.S. 91, 101 (1992).

The Act provides for two kinds of pollution control requirements: technology-based requirements and water quality-based requirements. Technology-based requirements are based on the capability of existing pollution control technologies to remove particular substances from wastewater. Effluent limitations, reflecting technology-based requirements that restrict the quantities, rates, and concentrations of specified substances that may be discharged into waters from point sources, may be established by the Environmental Protection Agency (EPA), a State, or an authorized Indian Tribe. See 33 U.S.C. 1311, 1342, 1377(e).

Water quality standards are generally set by individual States or authorized Indian Tribes. 33 U.S.C. 1313. Water quality standards operate by giving content to the desired condition of a particular waterway. State water quality standards are used to set additional effluent limitations supplementary to federal technology-based requirements, "so that numerous point sources, despite individual compliance

with [technology-based] effluent limitations, may be further regulated to prevent water quality from falling below acceptable levels." *EPA* v. *California ex rel. State Water Resources Control Bd.*, 426 U.S. 200, 205 n.12 (1976).

The CWA expressly preserves States' authority to establish requirements more stringent than requirements established by EPA. 33 U.S.C. 1370; see *Arkansas* v. *Oklahoma*, 503 U.S. at 107; 40 C.F.R. 131.4(a). In setting water quality standards, the States "are free to force technology" and are free to adopt stringent standards "even at the cost of economic and social dislocations." *United States Steel Corp.* v. *Train*, 556 F.2d 822, 838 (7th Cir. 1977).

The CWA requires each State to adopt water quality standards for all waters of the State, and to submit those standards to EPA for approval. 33 U.S.C. 1313(c). States must specify one or more designated "uses" of each waterway (*e.g.*, public water supply, recreation, fish propagation, or agriculture) and must establish water quality standards based on those uses. 33 U.S.C. 1313(c)(2)(A). EPA reviews all new or revised state water quality standards for consistency with the requirements of the Act. 33 U.S.C. 1313(c)(3). If a state standard does not meet minimum federal requirements, then it must be disapproved by EPA. The State may then adopt changes suggested by EPA, or, failing such action, EPA must itself issue a water quality standard for the State. 33 U.S.C. 1313(c)(3) and (4)(A).

The CWA sets forth certain water uses as baseline concerns of the Act—principally fishing and swimming. See 33 U.S.C. 1251(a)(2). If a State designates a waterway for uses that do not include all those uses, then the State must submit "technical and scientific

data and analyses" to demonstrate why the omitted uses are not attainable. 40 C.F.R. 131.5(a)(4); see 48 Fed. Reg. 51,401, 51,409 (1983). The CWA does not, however, authorize or require EPA to review or disapprove a State's designation of uses or water quality criteria solely on the ground that they are too *stringent*. Therefore, no submission of scientific data is required to justify the State's adoption of standards that exceed federal requirements.

Both technology-based standards and water quality-based standards are applied through a permit process. The Act prohibits the "discharge of any pollutant" into the nation's waters except as authorized by a National Pollutant Discharge Elimination System (NPDES) permit. 33 U.S.C. 1342; see *EPA* v. *California*, 426 U.S. at 205. All NPDES permits must include effluent limitations (*i.e.*, restrictions on qualities, rates, and concentrations of discharged pollutants) that require the permittee's adherence to federal technology-based limitations and, where applicable, more stringent water quality-based limitations designed to ensure that the receiving waters attain and maintain state water quality standards. See 33 U.S.C. 1342(a)(1); 40 C.F.R. 122.4(d); *Arkansas* v. *Oklahoma*, 503 U.S. at 104-107. EPA regulations provide that a NPDES permit shall not be issued "[w]hen the imposition of conditions cannot ensure compliance with the applicable water quality requirements of *all affected States*." 40 C.F.R. 122.4(d) (emphasis added). Thus, any NPDES permit issued to a discharger in an *upstream* State must include limitations necessary to comply with the water quality standards of *downstream* States. *Arkansas* v. *Oklahoma*, 503 U.S. at 107.

2. Federal law generally prohibits States from exercising regulatory authority on Indian lands, except as authorized by Congress. See *California* v. *Cabazon Band of Mission Indians*, 480 U.S. 202, 216 & n.18 (1987). As originally enacted, the CWA did not specifically identify any governmental entity with authority to set standards for waters on Indian lands within States. Congress amended the CWA in 1987 to provide that EPA may treat qualifying Tribes in the same manner as States for the purpose of, *inter alia*, setting water quality standards on waters within their lands. 33 U.S.C. 1377(e). By amending the statute in that manner, Congress "assure[d] that Indian tribes would be able to exercise the same regulatory jurisdiction over water quality matters with regard to waters within Indian jurisdiction that States have been exercising over their water." 133 Cong. Rec. 1583 (1987) (statement of Sen. Burdick). Congress also required, in the 1987 amendments, that the Administrator "provide a mechanism for the resolution of any unreasonable consequences that may arise as a result of differing water quality standards that may be set by States and Indian tribes located on common bodies of water." 33 U.S.C. 1377(e).

3. In 1991, EPA promulgated regulations for the treatment of Indian Tribes in the same manner as States, as required by the CWA. 56 Fed. Reg. 64,876. The regulations establish the procedures by which Indian Tribes may apply for treatment in the same manner as States for purposes of the water quality standards program. The regulations also provide that, in the event of a dispute between a Tribe and a State about differing water quality standards on the same body of water, either the Tribe or the State may request that EPA resolve the dispute. 40

C.F.R. 131.7(a) and (c). Upon such a request, EPA may initiate mediation or arbitration to resolve the dispute, or may appoint a person or panel to recommend a resolution of the dispute. 40 C.F.R. 131.7(f). Interested parties other than the State or the Tribe, including NPDES permittees, may be invited to participate in the dispute-resolution process, see 40 C.F.R. 131.7(d) and (g), but they are not authorized to initiate the process themselves.

The Pueblo of Isleta was the first Indian Tribe to obtain approval from EPA to be treated in the same manner as a State for purposes of the water quality standards program. The Pueblo submitted an application for treatment in the same manner as a State on February 13, 1992. The Pueblo also submitted its water quality standards for approval. After consulting with other affected governments and considering comments submitted by various interested parties, including petitioner, EPA approved the Pueblo's request to be treated in the same manner as a State for water quality standards purposes on October 13, 1992. See Gov't C.A. Br. 14.

EPA then reviewed the Tribe's water quality standards. EPA requested clarification of certain provisions of the standards, and made recommendations regarding the stringency of certain water quality criteria. The Pueblo provided a detailed response to EPA's recommendations, adopting some of EPA's recommendations and setting forth its reasons for choosing not to adopt others. After reviewing the Pueblo's response, EPA determined that the Pueblo's standards satisfied all applicable substantive and procedural requirements and should be approved. In doing so, EPA expressly noted that the CWA allows a State (and a Tribe treated in the same manner as a

State) to adopt water quality standards that are more stringent than EPA's recommended criteria. Gov't C.A. Br. 15.

4. Petitioner is an NPDES permittee upstream of the Pueblo's tribal lands on the Rio Grande River. Under the CWA, as interpreted by EPA, petitioner's NPDES permit must ensure that its discharges into the Rio Grande comply with the water quality standards of all affected downstream States (and authorized Tribes). In 1993, petitioner filed suit in district court, challenging EPA's approval of the Tribe's water quality standards. The district court granted summary judgment to EPA, Pet. App. 33-49, and the court of appeals affirmed, *id.* at 1-32.

The court of appeals concluded that, under the CWA, EPA may treat Tribes' water quality standards as equivalent to state standards—and, in particular, may permit Tribes' standards to exceed federal standards—and may thus require permittees in upstream States to avoid violations of more stringent water quality standards of downstream Tribes as well as States. The court found Congress's intent to be "unclear and ambiguous" on the point, but it concluded that EPA's construction of 33 U.S.C. 1377(e) to treat Tribes' water quality standards as functionally equivalent to those of States is reasonable, and therefore entitled to deference under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984).

The court noted that, in EPA's letter approving the Pueblo's water quality standards, EPA cited 33 U.S.C. 1370 as the basis for the Pueblo's authority to set water quality standards that are more strin-

gent than those recommended by EPA.[1] The court also noted that Section 1377(e), which authorizes EPA to treat Tribes in the same manner as States for certain express purposes, does not incorporate Section 1370 as one of the statutory bases for EPA's treatment of Tribes as equivalent to States.[2] Nonetheless, the court concluded that EPA is authorized to allow Tribes' standards to exceed federal standards, since EPA "construes § 1370 as a savings clause that merely recognizes powers already held by the states. Thus, Congress's failure to incorporate § 1370 into § 1377 does not prevent Indian tribes from exercising their inherent sovereign power to adopt standards or limits that are more stringent than those imposed by the federal government. Indian tribes have residual sovereign powers that already

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[1] Section 1370 provides, in pertinent part:

> [N]othing in this chapter shall (1) preclude or deny the right of any State * * * to adopt or enforce (A) any standard or limitation respecting discharges of pollutants * * *; except that if an effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance is in effect under this chapter, such State * * * may not adopt or enforce any effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance which is less stringent than the effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance under this chapter.

[2] Section 1377(e) provides, in pertinent part: "The Administrator is authorized to treat an Indian tribe as a State for purposes of subchapter II of this chapter and sections 1254, 1256, 1313, 1315, 1318, 1319, 1324, 1329, 1341, 1342, and 1344 of this title to the degree necessary to carry out the objectives of this section."

guarantee the powers enumerated in § 1370, absent an express statutory elimination of those powers." Pet. App. 16-17.

The court rejected petitioner's argument that EPA had impermissibly allowed the Tribe to apply its water quality standards to an upstream source outside tribal boundaries. The court noted that, "[u]nder the statutory and regulatory scheme, tribes are not applying or enforcing their water quality standards beyond reservation boundaries. Instead, it is the EPA which is exercising its own authority in issuing NPDES permits in compliance with downstream state and tribal water quality standards." Pet. App. 18 (footnote omitted). The court found that "the 1987 amendment to the [CWA] clearly and unambiguously provides tribes the authority to establish NPDES programs in conjunction with the EPA," and that EPA therefore "has the authority to require upstream NPDES dischargers, such as [petitioner], to comply with downstream tribal standards." *Ibid.*

The court further rejected petitioner's contention that EPA's approval of the Pueblo's standards was arbitrary and capricious. Petitioner argued that EPA was obliged to reject the Pueblo's standards unless the record before EPA established a sound scientific basis for the standards. The court concluded, to the contrary, that if a State's or a Tribe's standards are at least as stringent as EPA's recommended standards, then EPA "may approve the standards without reviewing the scientific support for the standards," for States (and Tribes treated in the same manner as States) may force technological advancement to attain higher water quality. Pet. App. 24.

The court also rejected petitioner's argument that the process set up by EPA under Section 1377(e) for

resolution of disputes between States and Tribes was insufficient because it was nonbinding and because it failed to offer parties other than States and Tribes the opportunity to initiate the process. The court noted that Section 1377(e) "does not specify how or by whom the dispute resolution mechanism shall be initiated." Pet. App. 27. It also noted that Congress's establishment of the dispute-resolution process stemmed from the possibility that two sovereigns—a State and a Tribe—might come into conflict over differing water quality standards. "It is reasonable, therefore, to allow only those two sovereigns to initiate the dispute resolution process to resolve their differences." *Id.* at 28.

Finally, the court found no merit in petitioner's claim that EPA's approval of the Tribe's water quality standards violated the Establishment Clause. Petitioner emphasized that the Pueblo had designated ceremonial uses (including immersion and ingestion of water) as one of the designated uses of the Rio Grande River within tribal lands, and argued that EPA's approval of ceremonial religious uses of the River violated the First Amendment. The court concluded, however, that EPA's approval of the Pueblo's ceremonial use designation "serves a clear secular purpose: promotion of the goals of the [CWA]. The EPA's purpose in approving the designated use is unrelated to the Isleta Pueblo's religious reason for establishing it." Pet. App. 29-30. The court also concluded that EPA's action did not have the primary effect of advancing religion, since "EPA is not advancing religion through its own actions, and it is not promoting the Isleta Pueblo's religion. The primary effect of the EPA's action is to advance the goals of the [CWA]." *Id.* at 30. And it found no undue en-

tanglement between the government and religion based on EPA's approval of the Tribe's standards, as the approval "does not require any governmental involvement in the [Tribe's] religious practices." *Id.* at 30-31.

ARGUMENT

1. a. Petitioner argues (Pet. 9-12) that EPA's action in approving the Isleta Pueblo's water quality standards was arbitrary and capricious because EPA failed to determine that those standards were supported by a "sound, scientific rationale." That argument misapprehends the role of EPA under the CWA in reviewing the water quality standards of States and Tribes. EPA has consistently interpreted the CWA, especially 33 U.S.C. 1370, as preserving States' and Tribes' sovereign authority to regulate water quality on their lands, as long as their water quality standards are at least as stringent as the requirements of federal law. States and Tribes may therefore regulate water quality more strictly than does the federal government, and EPA does not second-guess their decision to do so.

The CWA expressly recognizes "the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution." 33 U.S.C. 1251(b). It also expressly preserves the authority of the States to establish water quality standards that are at least as stringent as federal requirements. 33 U.S.C. 1370. Those provisions make clear that the CWA does not occupy the field of regulation of water pollution and leaves the States free, consistent with our structure of dual sovereignty, to enact stricter regulation as long as that regulation does not conflict with federal law.

Under the CWA, EPA does review state wate quality standards to determine if they meet federa requirements. 33 U.S.C. 1313(c). Consistent with th preservation of state authority in the CWA, however EPA does not review the justification for state stan dards that exceed federal requirements. The court o appeals therefore correctly concluded (Pet. App. 24 that EPA may approve state (and tribal) standard without reviewing the scientific support for the ex tent to which they exceed federal requirements.

Petitioner places reliance on 40 C.F.R. 131.11 which provides that States' criteria for protecting designated uses must be based on "sound scientifi rationale." That regulation, however, requires only that States demonstrate that they will meet minimum federal standards. EPA has not construed that regu lation to require that States additionally justify a decision to impose water quality standards that are *stricter* than federal requirements. EPA's interpre tation of its own regulations is entitled to substantia deference. *Thomas Jefferson Univ.* v. *Shalala*, 512 U.S. 504, 512 (1994). Moreover, that regulation or which petitioner relies must be read in tandem with other EPA regulations, such as 40 C.F.R. 131.10(k) which make clear that a State need not conduct a "use attainability analysis" whenever it undertakes to protect all the designated uses for waters set forth in 33 U.S.C. 1251(a)(2)—the so-called "fishable swimmable" standard.[3] Thus, when a State decides t

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[3] EPA's regulations require EPA to determine whether a State's standards are based upon appropriate technical and scientific data *only* when the State's standards do not includ all the uses listed under Section 1251(a)(2). See 40 C.F.R 131.5(a)(4), 131.6(f). In that situation, the State must submit a

impose water quality standards that are more stringent than federal requirements, it need not demonstrate to EPA that the standards are technologically attainable.

b. EPA has also reasonably concluded that the accommodation of States' sovereign authority in the CWA extends also to the authority of Indian Tribes. Section 1377(e) directs the Administrator to treat qualifying Tribes in the same manner as States for the purposes of certain, enumerated provisions of the CWA. Petitioner argues that, because Section 1370—which recognizes the authority of States to set water quality standards more stringent than federal requirements—is not one of the provisions specifically enumerated in Section 1377(e), Congress did not intend to preserve Tribes' authority to set more stringent standards. That argument misapprehends the purpose of Section 1370. Unlike the provisions enumerated in Section 1377(e), which set forth specific roles for States and Tribes in the federal regulatory scheme, Section 1370 merely clarifies that Congress has not occupied the field of water pollution, and that preexisting state authority is preserved by the CWA, as long as state standards are at least as stringent as those required by the CWA. Because Section 1370 confers no new authority on States, but instead merely clarifies that existing state authority is preserved, its absence from the sections mentioned in Section 1377(e) does not prevent the Administrator from recognizing Tribes' similar authority to regulate water quality standards.

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use attainability analysis, explaining why certain uses are not reasonably attainable. See 48 Fed. Reg. 51,409 (1983).

EPA's recognition that Tribes, like States, have sovereign authority to regulate water quality is consistent with the background principle that Indian Tribes are "unique aggregations possessing attributes of sovereignty over both their members and their territory." *United States* v. *Mazurie*, 419 U.S. 544, 557 (1975). See also *Ramah Navajo School Bd., Inc.* v. *Bureau of Revenue*, 458 U.S. 832, 846 (1982) ("[F]ederal statutes and regulations relating to tribes and tribal activities must be 'construed generously in order to comport with . . . traditional notions of [tribal] sovereignty and with the federal policy of encouraging tribal independence.'"). When Congress amended the CWA in 1987, it reinforced tribal sovereignty by giving qualifying Tribes a specific role, similar to that of the States, in water quality regulation. Indeed, the language of Section 1377(e) presumes that Tribes may set standards more stringent than required by the Act. Section 1377(e) requires the Administrator to promulgate regulations that provide for the "resolution of any unreasonable consequences" resulting from "differing water quality standards that may be set by States and Indian tribes located on common bodies of water." That provision indicates that Congress anticipated that Tribes, like States, would in some instances adopt standards that are more stringent than the CWA requirements, and that disputes would therefore arise; it cannot be reconciled with petitioner's theory that Tribes do not have sovereign authority to establish water quality standards more stringent than required by the Act.

Contrary to petitioner's contention (Pet. 13), EPA's recognition of the Pueblo's water quality standards as functionally comparable to state standards

does not impermissibly extend tribal authority beyond tribal boundaries. The Pueblo's standards apply only to waters within its boundaries; it is EPA that has required NPDES permits issued in upstream States to include effluent limitations necessary to meet those standards. See *Arkansas* v. *Oklahoma*, 503 U.S. 91, 102-107 (1992). Just as a downstream State has no inherent authority to establish regulatory requirements for dischargers in an upstream State, a Tribe may not establish requirements for off-reservation water users. This Court, however, has upheld EPA's interpretation of the Act to require upstream dischargers to comply with the standards of downstream States. *Id.* at 107. EPA has concluded that, consistent with Section 1377(e), upstream point sources should comply with the standards of downstream qualifying Tribes as well as States. That conclusion conforms to Congress's intent that Tribes should be allowed to exercise authority under the Act similar to that of States.

2. Petitioner argues (Pet. 14-18) that EPA's approval of the Pueblo's water quality standard for "primary contact ceremonial use," which the Tribe defines as use for "religious or traditional purposes," offends the Establishment Clause. The court of appeals correctly held, however, that EPA's action satisfies all three prongs of the Establishment Clause test in *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971).

First, EPA's action has a clear secular purpose: promoting the goals of the Clean Water Act. The ultimate goal of the CWA is "zero discharge of pollutants" (see *National Wildlife Fed'n* v. *Gorsuch*, 693 F.2d 156, 179 (D.C. Cir. 1982) (citing 118 Cong. Rec. 33,693 (1972)), and EPA's approval of stringent water quality standards promotes that secular goal, even if

the Tribe has some religious motivation for adopting those stringent standards. The fact that the Pueblo may have its own religious reasons for desiring clean water is irrelevant to the secular purpose underlying EPA's decision to approve the standards, for, as explained above, EPA was not called upon to examine the scientific support for the Tribe's water quality standards, which are more stringent than federal requirements.

The second *Lemon* requirement is that the action must have a "principal or primary effect * * * that neither advances nor inhibits religion." 403 U.S. at 612. The *primary* effect of EPA's approval of the Tribe's water quality standards is to reduce pollution in the Rio Grande River, not to advance tribal religion. Indeed, *only* the former effect, and not the latter, is relevant to the exercise of EPA's statutory authority. Furthermore, "[f]or a law to have forbidden 'effects' under *Lemon*, it must be fair to say that the *government itself* has advanced religion through its own activities and influence." *Corporation of Presiding Bishop* v. *Amos*, 483 U.S. 327, 337 (1987). Hence, even if EPA's approval of the Pueblo's designated use has the incidental effect of permitting the Pueblo to continue its religious use of the water, that approval is not the same as "an unlawful fostering of religion" by EPA, see *id.* at 334-335.

The third *Lemon* requirement—that the government action not cause an "excessive entanglement" between the government and the religious entity—is also satisfied. EPA's approval of the Pueblo's more stringent water quality standards does not require any governmental involvement in the Pueblo's religious practices. Since EPA does not examine the scientific basis for the Tribe's water quality stan-

dards, it does not consider whether those standards are (or are not) in fact required to permit tribal ceremonies to go forward with the necessary degree of water purity.

3. Petitioner argues (Pet. 18-22) that the mechanism established by EPA to resolve disputes between States and Tribes over water quality standards does not satisfy requirements of the CWA. Petitioner contends that EPA has violated the statute by establishing a dispute resolution mechanism that relies on nonbinding mechanisms such as mediation and arbitration, and that denies permittees, such as itself, the right to initiate dispute resolution. Those claims are without merit.

First, EPA properly adopted a dispute-resolution process that relies on mediation and arbitration. Those methods are consistent with the CWA's preservation of state authority to adopt more stringent requirements than those of EPA, and the Act's requirement that EPA encourage cooperative activities by the States (see 33 U.S.C. 1253(a)). EPA chose mediation and arbitration because it recognized that the authority to alter substantive water quality standards that are consistent with the requirements of the Act resides in States and Tribes, not EPA. 56 Fed. Reg. 64,886 (1991). For EPA itself to resolve differences between a Tribe and a State, it would have to disapprove either the Tribe's or the State's standards, or both, on the basis that they are too stringent, and issue federal standards in their place. In effect, therefore, petitioner argues that, when Tribes and States disagree, Congress has authorized EPA to preempt the authority otherwise reserved by them. EPA has not purported to exercise such authority,

and petitioner's argument finds no basis in the text of the CWA.[4]

Second, EPA reasonably limited initiation of the dispute resolution process to Tribes and States. The need for dispute resolution arises from the possibility that differing standards may result in the inability of one sovereign to exercise its authority fully because of the actions of another sovereign (as, for example, when a downstream State or Tribe wishes to impose significantly more stringent standards than those in an upstream State). The purpose of the process is to resolve disputes between the sovereigns in such situations. Since only Tribes and States have the sovereign authority to alter water quality standards in order to resolve any unreasonable consequences from differing sovereign standards, EPA reasonably limited initiation of the process to those entities. EPA did, however, recognize that interested parties such as petitioner might be affected when Tribes and States set differing water quality standards on

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[4] The legislative history of the CWA also indicates that Congress did not intend EPA to overrule the decision of a Tribe or a State to establish water quality standards on a common water body. A memorandum prepared by the Senate Select Committee for Indian Affairs, observing that "there is nothing in the [then] existing [Clean Water] Act or in the [then] proposed amendments which gives EPA the power to force one state to change its approved water quality standards * * * in order to accommodate the water quality needs of another state or states," was cited with approval in floor debates in both the House and Senate on the 1987 CWA amendments. 133 Cong. Rec. 1282 (1987) (statement of Sen. Baucus); *id.* at 1000 (statement of Rep. Morrison). The same memorandum also observes that the proposed dispute resolution mechanism would not give EPA the authority to force changes in state water quality standards. *Id.* at 1000, 1282.

common water bodies, and its regulations therefore authorize the EPA Regional Administrator to invite or allow such affected parties to participate in the dispute resolution process. 40 C.F.R. 131.7(d) and (g)(2).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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